Supreme Court, U.S.
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No. 95-1367

In The

Supreme Court of the United States

October Term, 1995

MENTOR CORPORATION,

Petitioner and Cross-Respondent,

v.

ALFRED BINGHAM,

Respondent and Cross-Petitioner.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Medical Device Amendments to the federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360c *et seq.*, preempt state-law products liability claims to recover for injuries caused by a defective medical device?

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent Alfred Bingham responds to the petition for a writ of certiorari filed by petitioner Mentor Corporation. The petition seeks review of a ruling of the United States Court of Appeals for the Fifth Circuit concerning injuries suffered by Mr. Bingham at the hands of petitioner's allegedly defective inflatable penile prosthesis. The court of appeals held that respondent's claims based on defective design of the medical device were not preempted by the Medical Device Amendments (MDA) to the Food, Drug and Cosmetic Act, 21 U.S.C. § 360c *et seq.*

Respondent agrees with petitioner that review should be granted to resolve the issue of preemption under the MDA. In addition, a cross-petition has been filed by Alfred Bingham concerning those claims that the Fifth Circuit held were preempted. A grant of certiorari on both the petition and the cross-petition will enable the Court to examine all of the preemption issues that were decided below.

The Court has granted the petitions for writs of certiorari in *Medtronic, Inc. v. Lohr,* No. 95-754 and No. 95-886. Many of the same MDA preemption issues are present in that case. In light of Mentor's petition for certiorari a cross-petition was filed to ensure that the Court would be able to decide the whole range of preemption issues presented below.

CONCLUSION

For the reasons stated above, and explained in detail in respondent's cross-petition, the petition for a writ of certiorari and the corresponding cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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